

RECEIVED

Jul 26 1995

)

)

)

1

)

)

1

)

)

DOCKET FILE COPY ORIGINAL

1995

I. THE STATUS OF COMPETITION

1/ See, e.g., Comments of Bell Atlantic at 1 ("the incumbent cable industry remains the overwhelmingly dominant provider of multichannel video services to American homes"); Comments of BellSouth at 9 (concluding that regulatory barriers "effectively eliminate would-be cable television market contestants"); Comments of DIRECTV at 4 (urging the Commission to focus on the cable industry's attempts to perpetuate its monopoly position); Comments of GTE at 4 (remarking that "virtually nothing has changed to alter cable operators' overriding monopoly positions" since last year); Comments of Mets Fans United at 4 ("by any standard of measurement, competition in the current marketplace for video programming does not exist"); Comments of NRTC at 1 (arguing that the vertically-integrated cable programming industry continues to stifle competition in the market); Comments of NYNEX at 2 (finding the

(continued...)

No. of Copies rec'd.
List A B C D E

is competitive, and not surprisingly, most of these parties represent (or are affiliated with) cable operators.^{2/} Moreover, the "evidence" these parties typically cite to support their assertions is purely speculative.^{3/}

Liberty disagrees with those who assert that competition exists in the video services marketplace. While some alternative service providers may have more subscribers today than they did last year, any increases have been relatively small. Furthermore, these increases in subscribership do not mean that alternative service providers represent any threat to cable's dominance in the marketplace. Most subscribers of alternative service providers live in rural areas unserved by cable and do not have the

^{1/}(...continued)
video programming market no more competitive now than it was last year); Comments of OpTel at 2 (noting that "most consumers are deprived of the benefits of competition" in the video marketplace); Comments of the Video Dialtone Association at 2 ("the competitive environment has changed very little over the past year").

^{2/} See, e.g., Comments of NCTA at 4-18; Comments of HBO (a division of Time Warner Entertainment) at 1-2; Comments of Time Warner at 5-11; Comments of Primestar (a consortium of the nation's six largest MSOs) at 3-4.

WCAI, an association representing potential competitors to cable, observed that competition is beginning to develop in the video services market, but qualified this observation by stating that "it is rare at the present time for a wireless cable system to be effective competition to a competing wired cable system." Comments of WCAI at 6.

^{3/} See, e.g., Comments of NCTA at 11 (basing its competitive assessment of VDT on regulatory actions that it predicts "will unleash extraordinarily powerful competitors to the cable industry"); Comments of MPAA at 4 (claiming that it expects DBS subscribership to reach 13 million by the year 2000); Comments of NCTC at 5 (predicting that "direct satellite-to-home distribution is likely to be a significant competitive threat to NCTC members in the years ahead").

opportunity to reap the benefits of competition between cable operators and competing MVPDs.^{4/} Moreover, video dialtone service ("VDT"), long characterized by the cable industry as a formidable competitor, does not presently -- and may never -- provide any competition to existing cable services.^{5/}

II. SPECIFIC ISSUES

A. 18 GHz Licenses

The comments submitted by Liberty and others illustrate how cable interests have abused Commission procedures to suppress budding competition from alternative service providers.^{6/} As

^{4/} See, e.g., Comments of NRTC at 4-5 (stating that most of its subscribers are located in rural areas); Comments of PRIMESTAR at 4-5 (estimating that 80% of its subscribers are from areas not served by cable); Comments of PrimeTime 24 at 4 (noting that satellite subscribers are "predominantly located in rural areas where there is little or no off-air access to network programming"); Comments of WCAI at 8 (explaining that wireless cable systems typically focus marketing and installation efforts on uncabled areas because higher penetration rates can be achieved there).

^{5/} See, e.g., Comments of Bell Atlantic at 2 (noting that burdensome VDT regulations have caused many telephone companies either to reassess their video deployment plans or simply to abandon the common carrier VDT model); Comments of the Video Dialtone Association at 6-7 (discussing evidence that LECs are exploring alternative means to enter the video services market).

^{6/} See Comments of Liberty at 6-8. For examples of procedural abuse, several commenters point to the efforts of cable interests to derail the development of VDT. See, e.g., Comments of Bell Atlantic at 10 (urging the Commission to streamline VDT authorization procedures in order to reduce opportunities for regulatory gamesmanship by competitors); Comments of GTE at 14 (recommending a streamlined Section 214 process so that the cable industry's ability to game the system is eliminated); Comments of the Video Dialtone Association at 7-9 (illustrating the "meritless, and even frivolous" arguments the cable industry has advanced to delay VDT).

Liberty vividly describes in its comments, Time Warner has used the Commission's petition to deny process to thwart the growth of competition in Manhattan and to push Liberty to the brink of extinction.^{2/}

Over the past seven months, each time that Liberty filed a new application for an 18 GHz license -- licenses which are necessary for Liberty to provide service to new subscribers in MDUs interested in switching to Liberty's service -- Time Warner has filed petitions to deny the applications. Time Warner's petitions were filed solely to delay the approval of Liberty's applications. Evidence of this is the fact that Time Warner has even filed in opposition to Liberty's requests for Special Temporary Authority^{8/} while the Commission deliberates the merits of Time Warner's petitions. Time Warner has succeeded in bringing Liberty's activities to a grinding halt. Without FCC authorization to operate its facilities, Liberty has been unable to add new subscribers. The Commission must not continue to let its processes be abused in this manner.

B. Uniform Rates

Several parties offer evidence that the uniform pricing difficulties that Liberty faces in New York are occurring across

^{2/} Liberty reiterates the point made at pages 7-8 of its comments in this proceeding which is that Liberty does not here intend to argue the merits of the Time Warner Petitions to Deny. Rather, Liberty's intent is to make the Commission aware of how Time Warner has used Commission processes to stifle competition.

^{8/} Comments of Liberty at 7.

the country.^{9/} For example, Heartland Wireless Communications, a competing MVPD, states that it is currently investigating the pricing practices of the franchised cable operator in Ada, Oklahoma. According to Heartland, the Ada franchisee offers significantly discounted promotional rates, free equipment, and free installation to Heartland subscribers in an effort to lure them away from Heartland.^{10/} Heartland notes that the cable operator does not offer these rates and other perks to all persons within its franchise area, but only to Heartland subscribers.^{11/} Assuming these allegations are true, it is difficult to imagine a clearer case of unlawful predatory pricing.

OpTel contends that rate violations occur because franchised cable operators have both the opportunity and the incentive to engage in predatory pricing to prevent competitors from gaining a foothold.^{12/} The ultimate losers, however, are consumers. OpTel warns, and Liberty agrees, that if these practices are permitted, "the market [will] remain monolithic and ratepayers who do not have access to alternative sources of video programming will be funding discounted rates for subscribers where potential competition exists."^{13/}

^{9/} Cable operators are required by federal law and FCC regulation to employ a uniform rate structure throughout their franchised areas. See 47 U.S.C. § 543(d) and 47 C.F.R. § 76.984.

^{10/} Comments of Heartland Wireless at 1-2.

^{11/} Id. at 2.

^{12/} Comments of OpTel at 1, 4.

^{13/} Id. at 4.

Liberty supports the Commission's conclusion that such predatory pricing practices, even when practiced by cable operators subject to competition, "not only permit the charging of noncompetitive rates to consumers that are unprotected by either rate regulation or competitive pressure on rates, but also stifle the expansion of existing, especially nascent, competition."^{14/} Unfortunately, a recent U.S. Court of Appeals case exempts cable systems that face "effective competition" from the uniform pricing rules.^{15/}

To protect consumers from the effects of cable cross-subsidization, and to promote competition among video services providers, WCAI proposes that the Commission should urge Congress to amend the Communications Act so that it is clear that a geographically uniform pricing structure extends to all cable systems, whether they are subject to effective competition or not.^{16/} Liberty supports this proposal.

^{14/} See In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Buy-Through Prohibition, Third Order on Reconsideration, 9 FCC Rcd. 4316, 4327 (1994).

^{15/} Time Warner Entertainment Co., L.P. v. FCC, No. 93-1723, slip op. at 10-11 (D.C. Cir. June 6, 1995), reh'g denied, (D.C. Cir. Jul. 17, 1995).

^{16/} See Comments of WCAI at 21-22 ("WCAI believes that the Commission's view that a geographically uniform pricing structure must be extended to all cable systems is sound policy, and is consistent with the congressional intent supporting the 1992 Cable Act."). See also Comments of OpTel at 5:

[T]he Commission should oppose any legislative change that would facilitate price discrimination by franchised cable operators and retain its jurisdiction over the
(continued...)

C. Cable Inside Wiring

Liberty argues in its comments that the Commission's cable inside wiring rules must be altered to give residents of multiple dwelling units ("MDUs") an effective choice among competing service providers. Based upon the diverse support received for the proposal in this proceeding (as well as in the cable inside wiring proceeding),^{17/} the anti-competitive effects of the current inside wiring rules clearly are a national problem.

For example, Bell Atlantic, which hopes to compete in the video marketplace throughout the Mid-Atlantic region, urges the Commission to act promptly to amend its inside wiring rules.^{18/} Bell Atlantic states that "the current rules, which place the demarcation point at what is often a physically inaccessible location, effectively prevent consumers in MDUs from switching video delivery providers because of the expense and physical damage that may result."^{19/}

OpTel, an operator of several private and franchised cable systems around the country, argues persuasively that "restrictions

^{16/}(...continued)

rates charged by franchised cable operators wherever possible. Limiting the ability of dominant cable operators to undercut new entrants on a sub-market by sub-market basis will encourage the development of competition and protect subscribers from unfair and discriminatory rates.

^{17/} See, e.g., sources cited in Comments of Bell Atlantic at 11 nn.22 & 23; Comments of WCAI at 22-24 nn.48-52.

^{18/} Comments of Bell Atlantic at 11.

^{19/} Id.

on access to cable home wiring in MDUs make it extremely impractical, and in some cases impossible, for competing providers of video programming to compete for subscribers."^{20/} To solve this problem, OpTel suggests establishing the demarcation point outside a subscriber's premises so that the inside wiring can easily be detached from a service provider's common wires without damaging the MDU and without disrupting service to others.^{21/}

Similarly, WCAI, which represents wireless cable operators throughout the country, implores the Commission to revise its designation of the demarcation point for cable home wiring so that competition will benefit MDU residents as well as those living in single family homes.^{22/} Liberty concurs wholeheartedly with each of these positions and urges the Commission to modify its inside wiring rules so that consumers will have a meaningful choice among service providers.

D. Exclusive Contracts

Liberty's comments illustrate how exclusive contracts between MDU owners and cable operators in New York and New Jersey have precluded Liberty from providing service to consumers. To remedy this situation, Liberty asks the Commission to ban exclusive contracts because they inherently discourage competition.^{23/}

^{20/} Comments of OpTel at 5.

^{21/} Id. at 6.

^{22/} Comments of WCAI at 22-24.

^{23/} Comments of Liberty at 21-23.

OpTel reports similar experiences in its efforts to compete against an entrenched monopolist.^{24/} According to OpTel, one MSO in Phoenix, Arizona requires MDU owners to enter exclusive, perpetual contracts before the MSO will provide service.^{25/} OpTel correctly concludes that such contracts are used "only to foreclose the MDU to competing service providers," and urges the Commission to prohibit exclusive contracts that have a term which is longer than the cable operator's current franchise term.^{26/} Liberty agrees with OpTel's conclusion, but also believes that all exclusive contracts -- whether perpetual or not -- are anticompetitive and should be prohibited.^{27/}

E. Program Access

Various commenters in this proceeding urge the Commission to extend its program access rules to include non-vertically integrated satellite program providers. Many of these commenters offer first-hand experiences of how they have been unable to obtain programming under the existing regulatory scheme.^{28/} Liberty is

^{24/} Comments of OpTel at 3.

^{25/} Id.

^{26/} Id.

^{27/} Bell Atlantic also supports banning exclusive contracts, noting that "exclusive contracts deprive [MDU residents] of the right to choose competing video services, and deny alternative providers the opportunity to compete for their business." Comments of Bell Atlantic at 11-12.

^{28/} See Comments of CAI Wireless at 1-3 (discussing its inability to obtain Sportschannel New England and Sportschannel New York from Cablevision); Comments of NCTC at 2 (citing its inability to obtain ESPN/ESPN 2, Country Music Television, The Nashville (continued...))

particularly sympathetic to the plight of these commenters because Liberty struggled for nearly two years to obtain Court TV from Time Warner.^{29/} Indeed, Liberty exerted significant time, effort and capital to exercise its lawful right to offer Court TV.^{30/} While Liberty is pleased with the Commission's ultimate decision regarding Court TV, the Commission should understand that discriminatory practices that hinder the distribution of programming impede the development of competition in the video services market and should not be permitted.

CONCLUSION

The record demonstrates that Congress' vision of a competitive video marketplace has not yet been realized. The Commission has the opportunity in this proceeding, however, to work together with Congress to facilitate the realization of that goal. Liberty

^{28/} (...continued)
Network, Lifetime, and USA); Comments of PrimeTime 24 at 5-6 (discussing its difficulties obtaining ESPN); Comments of Satellite Receivers at 3 (citing its inability to obtain ESPN and NFL Sunday Ticket).

For other comments favoring the extension of the program access rules see Comments of HBO at 24; Comments of NRTC at 8-10; Comments of WCAI at 16-19.

^{29/} See In the Matter of Time Warner Cable Petition for Public Interest Determination under 47 C.F.R. § 76.1002(c)(4) Relating to Exclusive Distribution of Courtroom Television, Memorandum Opinion and Order, CSR-4231-P, released June 1, 1994.

^{30/} See Comments of Liberty in CS Docket No. 94-48 at 11-13.

therefore requests that the Commission move expeditiously to implement the proposals made by Liberty in this proceeding.

Respectfully submitted,

LIBERTY CABLE COMPANY INC.

**GINSBURG, FELDMAN AND BRESS
CHARTERED, ITS ATTORNEYS**

By: 

Henry M. Rivera

Jay S. Newman

Darren L. Nunn

1250 Connecticut Avenue, N.W.
Washington, DC 20036

202-637-9000

Dated: July 28, 1995